

The Honorable James L. Robart

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION, a Washington  
corporation,

Plaintiff,

v.

MOTOROLA, INC., MOTOROLA  
MOBILITY, INC., and GENERAL  
INSTRUMENT CORPORATION,

Defendants.

CASE NO. C10-1823-JLR

DECLARATION OF SAMUEL L.  
BRENNER IN SUPPORT OF THE  
DAUBERT MOTION TO EXCLUDE  
CERTAIN TESTIMONY OF PLAINTIFF'S  
EXPERTS DRS. LYNDE, MURPHY, AND  
SIMCOE

**NOTED ON MOTION CALENDAR:  
Monday, September 10, 2012**

DECLARATION OF SAMUEL L. BRENNER IN SUPPORT OF  
THE DAUBERT MOTION TO EXCLUDE CERTAIN  
TESTIMONY OF PLAINTIFF'S EXPERTS DRS. LYNDE,  
MURPHY, AND SIMCOE  
CASE NO. C10-1823-JLR

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1 I, SAMUEL L. BRENNER, declare as follows:

2 1. I am an associate at the law firm of Ropes & Gray LLP, counsel to counsel to  
3 Motorola, Inc. (now Motorola Solutions, Inc.), Motorola Mobility, Inc. and General Instrument  
4 Corporation (collectively "Motorola"), Defendants in this action, and am a member in good  
5 standing of the bars of the Commonwealth of Massachusetts and State of California.

6 2. I submit this declaration in support of Motorola Mobility's and General  
7 Instrument's *Daubert* Motion to Exclude Certain Testimony of Plaintiff's Experts Drs. Lynde,  
8 Murphy, and Simcoe, submitted concurrently herewith.

9 3. Attached as Exhibit 1 is a true and correct copy of a document entitled "Standards-  
10 Setting, IPR Policies and Stakeholder Considerations," by Amy Marasco, General Manager,  
11 Standards Strategy, Microsoft Corporation, bearing production numbers  
12 MOTM\_WASH1823\_0054850-64. This document was previously submitted to the Court as  
13 Exhibit 19 to the July 18, 2012 Declaration of Kevin J. Post in Support of Motorola Mobility's and  
14 General Instrument's Motion for Partial Summary Judgment (Dkt. No. 363).

15 4. Attached as Exhibit 2 is a true and correct copy of a June 14, 2011 letter sent by  
16 David Heiner, Microsoft's Vice President and Deputy General Counsel, and Amy Marasco,  
17 Microsoft's General Manager, Standards Strategy and Policy, to the Federal Trade Commission's  
18 Office of the Secretary regarding Patent Standards Workshop, Project No. P11-1204, bearing  
19 production numbers MOTM\_WASH1823\_0053365-81. This document was previously submitted  
20 to the Court as Exhibit 20 to the July 18, 2012 Declaration of Kevin J. Post in Support of Motorola  
21 Mobility's and General Instrument's Motion for Partial Summary Judgment (Dkt. No. 363).

22 5. Attached as Exhibit 3 is a true and correct copy of excerpts of the July 24, 2012  
23 Expert Report of Kevin M. Murphy (filed under seal).

24 6. Attached as Exhibit 4 is a true and correct copy of excerpts of the August 10, 2012  
25 Rebuttal Expert Report of Kevin M. Murphy (filed under seal).  
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1           7.       Attached as Exhibit 5 is a true and correct copy of excerpts of the July 24, 2012  
2 Expert Report of Matthew R. Lynde, Ph.D., Pursuant to Rule 26(a)(2)(B) (filed under seal).

3           8.       Attached as Exhibit 6 is a true and correct copy of excerpts of the August 10, 2012  
4 Rebuttal Report of Matthew R. Lynde, Ph.D., Pursuant to Rule 26(a)(2)(B) (filed under seal).

5           9.       Attached as Exhibit 7 is a true and correct copy of excerpts of the July 24, 2012  
6 Expert Report of Professor Timothy S. Simcoe (filed under seal).

7           10.      Attached as Exhibit 8 is a true and correct copy of excerpts of the August 10, 2012  
8 Rebuttal Report of Professor Timothy S. Simcoe (filed under seal).

9           11.      Attached as Exhibit 9 is a true and correct copy of selected pages from the  
10 transcript of the deposition of David A. Heiner, which was taken under oath in Seattle, WA, on  
11 March 28, 2012. This document was previously submitted to the Court as Exhibit 28 to the April  
12 13, 2012 Second Declaration of Kevin J. Post in Support of Defendants' Opposition to Microsoft's  
13 Motion for Partial Summary Judgment of Breach of Contract (Dkt. No. 273).

14          12.      Attached as Exhibit 10 is a true and correct copy of selected pages from the  
15 transcript of the January 18, 2012 hearing held in *In The Matter of Certain Gaming and*  
16 *Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752  
17 (U.S.I.T.C.) by ALJ Shaw, which reproduces the confidential sworn testimony given by Kevin M.  
18 Murphy and bears non-consecutive production numbers MOTM\_WASH1823\_0401508-813 (filed  
19 under seal). This document was previously submitted to the Court as Exhibit 52 to the April 13,  
20 2012 Second Declaration of Kevin J. Post in Support of Defendants' Opposition to Microsoft's  
21 Motion for Partial Summary Judgment of Breach of Contract (Dkt. No. 273).

22          13.      Attached as Exhibit 11 is a true and correct copy of an August 5, 2011, document  
23 entitled "Can standard setting organizations address patent holdup? Comments for the Federal  
24 Trade Commission," by Timothy Simcoe, Boston University School of Management, downloaded  
25 August 23, 2012, from [http://www.ftc.gov/os/comments/patentstandardsworkshop/00040-](http://www.ftc.gov/os/comments/patentstandardsworkshop/00040-80169.pdf)  
26 [80169.pdf](http://www.ftc.gov/os/comments/patentstandardsworkshop/00040-80169.pdf).

1           14. Attached as Exhibit 12 is a true and correct copy of the IEEE-SA Standards Board  
2 Bylaws, which were approved by the IEEE-SA Board of Governors in December 2009, bearing  
3 production numbers MOTM\_WASH1823\_0054722-41. This document was previously submitted  
4 to the Court as Exhibit 12 to the July 18, 2012 Declaration of Kevin J. Post in Support of Motorola  
5 Mobility's and General Instrument's Motion for Partial Summary Judgment (Dkt. No. 363).

6           15. Attached as Exhibit 13 is a true and correct copy of the Guidelines for  
7 Implementation of the Common Patent Policy for ITU-T/ITU-R/ISO/IEC, dated March 1, 2007,  
8 bearing production numbers MOTM\_WASH1823\_0092826-39. This document was previously  
9 submitted to the Court as Exhibit 13 to the July 18, 2012 Declaration of Kevin J. Post in Support  
10 of Motorola Mobility's and General Instrument's Motion for Partial Summary Judgment (Dkt. No.  
11 363).

12           16. Attached as Exhibit 14 is a true and correct copy of a article entitled "Interpreting  
13 and Enforcing the Voluntary FRAND Commitment," by Roger G. Brooks & Damien Geradin, 9  
14 *International Journal of IT Standards and Standardization Research* 1, 1-23 (January-June 2011).  
15 This document was previously submitted to the Court as Exhibit 16 to the July 18, 2012  
16 Declaration of Kevin J. Post in Support of Motorola Mobility's and General Instrument's Motion  
17 for Partial Summary Judgment (Dkt. No. 363).

18           17. Attached as Exhibit 15 is true and correct copy of a compilation of Patent  
19 Statements and Licensing Declarations submitted by Motorola Mobility, Inc., Motorola, Inc. and  
20 General Instrument Corp. to the ITU, bearing consecutive production numbers  
21 MOTM\_WASH1823\_0000035-67, 74-77. This document was previously submitted to the Court  
22 as Exhibit 15 to the March 30, 2012 Declaration of Kevin J. Post in Support of Defendants'  
23 Motion for Partial Summary Judgment (Dkt. No. 230) and as Exhibit 5 to the July 18, 2012  
24 Declaration of Kevin J. Post in Support of Motorola Mobility's and General Instrument's Motion  
25 for Partial Summary Judgment (Dkt. No. 363).  
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1           18. Attached as Exhibit 16 is a true and correct copy of a compilation of Letters of  
2 Assurance submitted by Motorola, Inc. and Symbol Technologies, Inc. to the IEEE, bearing  
3 consecutive production numbers MOTM\_WASH1823\_0000001-34. This document was  
4 previously submitted to the Court as Exhibit 16 to the March 30, 2012 Declaration of Kevin J.  
5 Post in Support of Defendants' Motion for Partial Summary Judgment (Dkt. No. 230) and as  
6 Exhibit 7 to the July 18, 2012 Declaration of Kevin J. Post in Support of Motorola Mobility's and  
7 General Instrument's Motion for Partial Summary Judgment (Dkt. No. 363).

8           19. Attached as Exhibit 17 is a true and correct copy of selected pages from American  
9 Bar Association, Section of Science & Technology Law, Committee on Technical  
10 Standardization, *Standard Development Patent Policy Manual* (2007), bearing production  
11 numbers MOTM\_WASH1823\_0054693-99. This document was previously submitted to the  
12 Court as Exhibit 17 to the March 30, 2012 Declaration of Kevin J. Post in Support of Defendants'  
13 Motion for Partial Summary Judgment (Dkt. No. 230).

14           20. Attached as Exhibit 18 is a true and correct copy of an article by Doug Lichtman,  
15 entitled "Understanding the RAND Commitment," 47 Hous. L. Rev. 1023 (2010-11).

16           21. Attached as Exhibit 19 is a true and correct copy of a January 12, 2011 presentation  
17 entitled "IPR Issues and ITU's standardization activities," by Antoine Dore, Legal Officer, ITU  
18 Legal Affairs Unit, downloaded August 23, 2012, from [http://www.itu.int/dms\\_pub/itu-](http://www.itu.int/dms_pub/itu-t/oth/06/47/T06470000020005PDFE.pdf)  
19 [t/oth/06/47/T06470000020005PDFE.pdf](http://www.itu.int/dms_pub/itu-t/oth/06/47/T06470000020005PDFE.pdf).

20           22. Attached as Exhibit 20 is a true and correct copy of a document (updated August  
21 24, 2010) containing the IEEE Standards Association's Antitrust and Competition Policy and  
22 entitled "Promoting Competition and Innovation: What You Need to Know about the IEEE  
23 Standards Association's Antitrust and Competition Policy," downloaded August 23, 2012, from  
24 <http://standards.ieee.org/develop/policies/antitrust.pdf>.

1           23. Attached as Exhibit 21 is a true and correct copy of selected pages from the  
2 transcript of the deposition of Kevin M. Murphy, which was taken under oath in Chicago, Illinois,  
3 on Wednesday, August 22, 2012 (filed under seal).

4           24. Attached as Exhibit 22 is a true and correct copy of a document titled "IEEE-SA  
5 Standards Board Operations Manual," approved by the IEEE-SA Standards Board December  
6 2011, which was downloaded from [http://standards.ieee.org/develop/policies/opman/sb\\_om.pdf](http://standards.ieee.org/develop/policies/opman/sb_om.pdf).  
7 This document was previously submitted to the Court as Exhibit 33 to the April 13, 2012 Second  
8 Declaration of Kevin J. Post in Support of Defendants' Opposition to Microsoft's Motion for  
9 Partial Summary Judgment of Breach of Contract (Dkt. No. 273).

10           25. Attached as Exhibit 23 is a true and correct copy of a comment submitted by the  
11 Association for Competitive Technology to the FTC on August 5, 2011, downloaded August 26,  
12 2012 from <http://www.ftc.gov/os/comments/patentstandardsworkshop/00050-80203.pdf>.

13           26. Attached as Exhibit 24 is a true and correct copy of a comment submitted by the  
14 Telecommunications Industry Association to the FTC on June 14, 2011, downloaded August 26,  
15 2012 from <http://www.ftc.gov/os/comments/patentstandardsworkshop/00016-60530.pdf>.

16           27. Attached as Exhibit 25 is a true and correct copy of a comment submitted by  
17 Michele Herman to the FTC on June 14, 2011, downloaded August 26, 2012 from  
18 <http://www.ftc.gov/os/comments/patentstandardsworkshop/00014-60528.pdf>.

19           28. Attached as Exhibit 26 is a true and correct copy of a comment submitted by Nokia  
20 to the FTC on July 8, 2011, downloaded August 26, 2012 from  
21 <http://www.ftc.gov/os/comments/patentstandardsworkshop/00032-60891.pdf>.

22           29. Attached as Exhibit 27 is a true and correct copy of the Federal Trade  
23 Commission's Request for Comments and Announcement of Workshop on Standard-Setting  
24 Issues, 76 Fed. Reg. 28,036 (May 13, 2011), downloaded August 26, 2012, from  
25 <http://ftc.gov/os/fedreg/2011/05/110509standardsettingfrn.pdf>.

1           30. Attached as Exhibit 28 is a true and correct copy of an article entitled “The Ex Ante  
2 Auction Model for The Control of Market Power in Standard Setting Organizations,” by Damien  
3 Geradin, Anne Layne-Farrar, & A. Jorge Padilla, CEMFI Working Paper No. 0703, May 2007.

4           31. Attached as Exhibit 29 is a true and correct copy of an article entitled “The  
5 Complements Problem Within Standard Setting: Assessing the Evidence on Royalty Stacking,”  
6 Damien Geradin, Anne Layne-Farrar, & A. Jorge Padilla, 14 B.U. J. Sci. & Tech. L. 144, 148  
7 (2008).

8           32. Attached as Exhibit 30 is a true and correct copy of a document entitled “Can  
9 Standard-Setting lead to Exploitative Abuse? A Dissonant View on Patent Hold-Up, Royalty  
10 Stacking and the Meaning of FRAND,” by Damien Geradin & Miguel Rato, TILEC Discussion  
11 Paper, DP 2006-032, at 12 (Nov. 2006).

12           33. Attached as Exhibit 31 is a true and correct copy of an article entitled “Pricing  
13 Patents for Licensing in Standard-Setting Organizations: Making Sense of Frand Commitments,”  
14 by Anne Layne-Farrar, A. Jorge Padilla, and Richard Schmalensee, 74 Antitrust L.J. 671 (2007).

15           34. Attached as Exhibit 32 is a true and correct copy of an article entitled “Fair,  
16 Reasonable, and Non-Discriminatory (FRAND) Terms: A Challenge for Competition  
17 Authorities,” by Mario Mariniello, Journal of Competition Law & Economics, 7(3), 523–541, 532  
18 (2011).

19           35. Attached as Exhibit 33 is a true and correct copy of an internal Microsoft email,  
20 dated November 21, 2003, bearing production numbers MS-MOTO\_1823\_00002353089-91 (filed  
21 under seal).

22           36. Attached as Exhibit 34 is a true and correct copy of a blog post entitled “Follow Up  
23 on HTML5 Video in IE9,” by Dean Hachamovitch, dated May 3, 2010, which can be found at  
24 <http://blogs.msdn.com/b/ie/archive/2010/05/03/follow-up-on-html5-video-in-ie9.aspx>.

1 I declare under penalty of perjury of the laws of the United States and the State of  
2 Washington that the foregoing is true and correct.

3 DATED this 27th day of August, 2012.

4  
5 /s/ Samuel L. Brenner

6 Samuel L. Brenner  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 27th day of August, 2012.

/s/ Marcia A. Ripley

Marcia A. Ripley